UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA, Respondent	)	
v.	)	Crim. No. 00-51-P-C
	)	Civ. No. 03-63-P-C
SCOTT A. SUDDY, Petitioner	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

Scott Suddy plead guilty to one count of a two count indictment: he conceded he violated 21 U.S.C. § 841(a)(1) by distributing cocaine and 18 U.S.C. § 2 by aiding and abetting that crime. He was sentenced to ninety-eight months in prison. Suddy has now filed a motion pursuant to 28 U.S.C. § 2255 seeking relief from his conviction and sentence. (Docket No. 32.) The United States has filed a response (Docket No. 47), to which Suddy has replied (Docket No. 48). Because this motion is without merit I recommend that the Court **DENY** Suddy relief.

Prosecution's Version

According to the prosecution's version on May 15, 2000, Suddy and Philip Bisco registered together at a Portland, Maine hotel. (Prosecution Version, Docket No. 11, at 1.) From this hotel room that day Suddy had many conversations with a government informant concerning the informant's prospective purchase of cocaine. (Id.) During one of these conversations Suddy told the informant that he could sell four ounces of cocaine but that Suddy would have to contact Bisco prior to the sale. (Id.) In another conversation Suddy told the informant to go to a parking lot located next door to the hotel

to make the purchase. (Id.) That evening, at twenty-five minutes past five o'clock, Bisco walked from the hotel to the parking lot, got into the informant's car, gave the informant a box containing four ounces of cocaine, and received, in exchange, $5400 cash.

Discussion

Suddy is entitled to habeas relief from his federal conviction only "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255 ¶1.

Grounds

Suddy has already pursued a direct appeal to the First Circuit. The First Circuit rejected the arguments Suddy made on appeal. (Docket No. 26.) Any claims of constitutional deficiency (not premised on counsel's performance) that Suddy raised on appeal cannot be resuscitated in this habeas petition and any claims that could have been but were not raised on direct appeal are defaulted. Section 2255 relief "is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir.1996); see also Massaro v. United States, __ U.S. __, 123 S.Ct. 1690, 1693 (2003) ("[T]he general rule [is] that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice."); Knight v. United States, 37 F.3d 769, 773 (1st Cir. 1994) (stating that § 2255 is not a substitute for direct review).

That said, ineffective assistance of counsel claims are properly tendered in § 2255 motions. See Massaro, 123 S. Ct. at 1693-94; Knight, 37 F.3d at 774; see also United States v. Downs-Moses, 329 F.3d 253, 264-65 (1st Cir. 2003) ("Typically we do not consider claims of ineffective assistance of counsel on direct appeal"). In order to establish that his attorney's representation violated his constitutional right to effective assistance of counsel guaranteed by the Sixth Amendment, Suddy must make the two-pronged showing established in Strickland v. Washington, 466 U.S. 668 (1984) and extended to representation concerning guilty pleas in Hill v. Lockhart, 474 U.S. 52, 58-60 (1985). Suddy must demonstrate that his counsel's performance was so deficient it fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. He must also show that he suffered meaningful, measurable prejudice as a consequence, see id. at 687; that is, but for the deficiency in counsel's performance his case would have had a more favorable outcome, see id.; Knight, 37 F.3d at 774.

The only two grounds that are postured by Suddy as ineffective assistance of counsel grounds are Grounds One and Two.[1] In Ground One Suddy primarily argues that

[1] This Court appreciates the effort on the part of the United States to address all of Suddy's six delineated grounds as ineffective assistance of counsel claims as this Court does construe pro se habeas motions liberally.

However, on the whole, claims three through six are the type of claims that must be presented on direct appeal as they are straight-up challenges to his plea and sentence. These claims do not allege "injuries that could not have been raised ... on direct appeal and, if uncorrected, would result in a complete miscarriage of justice," Apfel, 97 F.3d at 1076; rather, Suddy's claims three through six are claims that are the milk and butter of direct appeal. In the absence of specific allegations relating to what counsel did or did not do that was inadequate, United States v. Butt, 731 F.2d 75, 78 (1st Cir. 1984) ("In order to state a claim of ineffective representation, the petitioner's allegations must clearly indicate the nature of the defense attorney's prejudicial conduct."), in this case I refrain from using my speculation (and from taking advantage of the United States' tolerant position) to whip these grounds into a form that would give a second life to challenges that are the proper fare of direct appeal.

To the extent that Suddy is challenging the fact that his sentence was improperly influenced by a co-conspirator's representations as to his drug transactions with Suddy, this is the type of claim that must be raised in direct appeal of his sentence. To the extent that Suddy is complaining that his attorney should have challenged the reliance on these representations at sentencing, I explain below why I view the stipulation made by counsel to be an entirely reasonable, constitutionally sound tactic in view of the

his attorney was constitutionally inadequate because he did not sufficiently prepare and he did not have an understanding of the facts, and, as a consequence of counsel's shortcomings, Suddy prematurely plead guilty. More specifically, although defense counsel petitioned this Court for a mental evaluation, the motion was denied, because "the government 'suggested' that [Suddy] was about to plead guilty," which he did. In Suddy's view his attorney should have procured such a study on his own and presented to this Court as evidence that Suddy was unable to understand the nature and consequences of the plea. Suddy faults counsel further for not renewing the motion for a psychological evaluation.

The record demonstrates that Suddy's memory of what transpired and when it transpired is not entirely accurate. And, the bottom line is, not one of his allegations pertaining to this claim undermines the record's portrayal of Suddy's competence to knowingly and intelligently plead guilty. During hearing on Suddy's change of plea the Court expressly asked Suddy if he had recently been under the care of a physician or psychiatrist. (R. 11. Tr. at 5.) Suddy responded that he had been under the care of a physician for a neck and back injury. (Id.) When asked, he indicated that he was neither taking any medication nor had he used drugs and/or alcohol within the preceding twenty-four hours. (Id.) The Court then asked whether his counsel had explained the consequences that could result from Suddy's change of plea on Count Two from not guilty to guilty. (Id.) Suddy stated that he had clearly understood the explanation provided by counsel. (Id. at 5-6.) Counsel indicated to the court that he had no reason to doubt Suddy's competency to enter the plea. (Id. at 6.) "Mr. Suddy," the Court asked,

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potential for a significantly greater drug quantity finding by the Court had the question preceded to an evidentiary hearing.

"have you pleaded guilty to the charges against you in Count Two of this indictment because you are in fact guilty as charged therein and for no other reason." (Id.) Suddy replied, "Yes." (Id.) Counsel concurred with this representation. (Id.)

During the colloquy Suddy went on to state that he had an adequate opportunity to discuss with his attorney the charges set out in Count Two; that his attorney had explained the nature and elements of the charged offense and the penalties that could be imposed; that he was satisfied with the advice and explanation given and representation rendered by counsel leading up to the plea; that he understood his right to stand by his not guilty plea and proceed to trial -- with the assistance of counsel; that he had a right to have the case heard by a jury to which the government would be required to prove Suddy's guilt beyond a reasonable doubt; that at a trial he would have the right to confront the government's witnesses and test its evidence; that at a trial he would have the right to put forth his own evidence and testify, or not, on his own behalf; that by pleading he was giving up his right to a trial of any kind; and that on the entry of judgment on the plea he would then have no effective right of appeal from the conviction. (Id. at 6-10.) Suddy indicated that he still chose to plead guilty to Count Two. (Id. at 11.)

Counsel indicated to the Court that he had read the indictment to Suddy, which Suddy confirmed, and a copy of the indictment was placed in front of Suddy. (Id. at 11-12.) Suddy told the court that he understood the count to which he was pleading guilty as charging him "with having committed the offense of distribution of cocaine and aiding and abetting therein in violation of the pertinent provisions of federal law. " (Id. at 12.) Suddy assured the Court, after consultation with his lawyer, that he understood that if he

was convicted of the offense that he would be subject to imprisonment for not more than thirty years, a fine of up to two million dollars, and a term of up to six years of supervised release. (Id. at 12-13.)

Suddy and counsel were questioned concerning Suddy's familiarity with the prosecution's version (summarized above). (Id. at 14-17.) Suddy read the version during the hearing and responded affirmatively when asked whether he knew and understood everything contained in it and whether counsel had successfully explained that the version of events would form the basis of the Court's sentence. (Id. at 14-16.) The Court asked if there was anything contained in the prosecution's version that he believed was inaccurate or incorrect in any way. (Id. at 16.) Suddy replied, "No." Id. Suddy declared that the information in the version was correct and that he was in fact guilty as charged in Count Two. (Id.) Defense counsel stated that he was satisfied that the government could in fact produce admissible evidence sufficient for a properly instructed jury to determine beyond a reasonable doubt that Suddy was guilty of the Count Two conduct. (Id. at 16-17.) The Court found that there was a factual basis for the plea. (Id. at 17.)

Defense counsel moved for a psychological evaluation the day after the entry of the guilty plea.[2] The motion stated that Suddy had a longstanding substance abuse history and had been treated by a psychiatrist at the Maine Correctional Institute when incarcerated at the age of eighteen. Counsel explained that Suddy had a family history of substance abuse, was the victim of physical abuse by a stepfather, and had a long personal history of substance abuse. Counsel argued that a psychological evaluation was necessary in order to evaluate whether Suddy had a mental health diagnosis that might

[2] It is not clear to me, in view of this sequence of events, how Suddy got the impression that this Court denied the mental evaluation because "the government 'suggested' that [Suddy] was about to be plead guilty."

bear on his sentencing either by influencing his precise sentence or supporting a departure. The Court denied the motion, concluding there was not a factual predicate to order the evaluation.

In view of this record it cannot be said that Counsel's representation vis-à-vis Suddy's plea and sentencing was so deficient it fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. During the change of plea hearing Suddy's "sworn statements were lucid, articulate, and inconsistent with his claim that he did not enter a knowing and intelligent plea." United States v. Vaughan, 13 F.3d 1186, 1187 (8th Cir. 1994). Suddy responded in a "coherent and rational manner in the colloquy." United States v. Allen, 981 F. Supp. 564, 579 (N.D. Iowa 1997) (collecting cases). "Courts have commonly relied on the defendant's own assurance (and assurances from counsel) that the defendant's mind is clear" and "the defendant's own performance in the course of a colloquy may confirm, or occasionally undermine, his assurances." United States v. Savinon-Acosta, 232 F.3d 265, 269 (1st Cir. 2000). Suddy has not alleged that Counsel was privy to additional information undisclosed to the Court that would have, if produced, altered the Court's view of Suddy's competency to plea or changed the outcome of the post-plea motion for a psychological evaluation. See Ruiz v. United States, __ F.3d __, 2003 WL 21805202, *3 (1st Cir. Aug. 7, 2003). Counsel's decision not to renew the motion in view of the Court's conclusion that an evaluation was not warranted was, likewise, within Stickland's universe of objectively reasonable representation. See Figueroa-Vazquez v. United States, 718 F.2d 511, 513 (1st Cir. 1983). In any event the renewal would only have impacted the imposition of the sentence

and Suddy does not in fact claim that counsel should have or could have used the proposed evaluation to Suddy's advantage during sentencing. [3]

In his first ground Suddy also faults his attorney for agreeing with the government's attribution of large drug quantities to Suddy instead of pressing to have the Court make specific factual findings as to drug totals. While counsel challenged the attribution of 511 grams of cocaine in the Pre-Sentence Report (PSI), counsel did not renew the objection at sentencing allowing the United States' mere speculation to serve as the basis for the sentence. Defense counsel, Suddy states, abandoned any challenge to drug quantities and agreed to everything that the prosecutor wanted, even though there was no direct evidence of the higher drug totals. [4] Suddy further contends, as best as I can fathom, that counsel should have garnered a written plea agreement from the United States that limited Suddy's exposure to the attribution of 142 grams. In a related theory he contends his attorney should not have allowed the dismissal of the Count One conspiracy charge without insisting on this written plea agreement, a failure that allowed the United States to attribute higher drug quantities to Suddy during sentencing by using the conduit of the Count Two 18 U.S.C. § 2 aiding and abetting charge. These lingering Count One arguments dovetail into Suddy's second ineffective assistance claim: that counsel should have challenged the indictment's aiding and abetting element on the grounds that Suddy was not on notice as to the penalties he faced.

As set forth above, the Court clearly advised Suddy that he faced up to thirty years imprisonment for the Count Two conviction. (R. 11. Tr. at 12-13.) See 21 U.S.C.

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[3] I also note that in preparation for sentencing counsel did submit a thorough memorandum to the Court detailing Suddy's troubled history in seeking a downward adjustment and an adjustment of his criminal history category. (Docket No. 18.)

[4] In Suddy's view counsel also failed in allowing the United States to use hearsay testimony of a defendant in an unrelated case as a means of attributing drug quantity to Suddy.

§ 841(b)(1)(C). The Court also informed Suddy at this time that the ultimate sentence would be premised on the information received by the Court in the PSR and that the Court had authority in some circumstances to impose a sentence more or less severe than the Guideline range. (Id. at 18 -19.) Suddy acknowledged that he had discussed the range with his attorney and that he fully understood the explanation of counsel. (Id. at 18.) Suddy told the Court that he understood that there was no plea agreement with the United States. (Id. at 17.)

On October 26, 2000, the Court issued a procedural order in anticipation of sentencing. (Docket No. 17.) Therein it listed seven areas of dispute. Among these was the proper level of drug quantity involved in the offense level, listed as issue 2.

At sentencing the Court inquired of Suddy whether he had read the revised presentence report in its entirety. (Sentencing Tr. at 2.) Suddy indicated that he had understood everything contained in it; that counsel had explained its contents and he fully understood the explanation; that counsel had successfully answered all of Suddy's questions about the meaning and significance of the contents and Suddy had no lingering questions; and that Suddy realized that to the extent the Court accepted the contents of the report it would form part of the basis for the sentence. (Id. at 3.) Suddy also stated that he was apprised of and counsel had explained the issues set forth in the October 26, 2000, procedural order. (Id. at 3-4.) The Court asked, "Did you clearly understand his explanation in each case?" (Id. at 4.) Suddy replied in the affirmative. (Id.) "Do you understand," the Court pursued, " that [counsel] has now, on your behalf withdrawn issues 1 and 2 as listed in that order." (Id.) Suddy replied, "Yes." (Id.) "Has he explained that to you?" the Court inquired. (Id.) "Yes," replied Suddy. (Id.) And, "Yes"

was Suddy's reply to the Court question, "So you consent and agree to the withdrawal of your objection generating those issues?" (Id.) The Court later accepted the parties' stipulation to 511 grams. (Id. at 24.)

With respect to counsel's obligation to raise a challenge to drug quantity for sentencing purposes,[5] I note, as does the United States, that the PSR established an amount of 2.18 kilograms with regards to co-aiders-and-abettors Bisco and Suddy, almost four times higher than the amount to which Suddy and the United States stipulated. (PSR. at 5.) The PSR details several drug transactions in which Suddy was involved over an eleven week period and sliced more than half of that quantity off the top to discount the PSR recommended sentencing amount by the level of Suddy's and Bisco's personal use.

Suddy simply has not plead facts to contravene the record support for attributing at least the stipulated quantity to Suddy; indeed Suddy had not attempted to make concrete allegations that would concretely undermine the level of drugs attributed to him by the PSR or the stipulated amount of 511 grams. See Berkey v. United States, 318 F.3d 768, 773 -74 (7th Cir. 2003) (noting vis-à-vis a like claim that the § 2255 movant failed, as he did at the pleading stage, "to point to any evidence he would have presented that would create a reasonable probability that the result of the proceedings would have been different"). The First Circuit in David v. United States explained that in order to "progress to an evidentiary hearing, a habeas petitioner must do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings."

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[5] Because Suddy's ninety-six month sentence was below the 21 U.S.C. § 841 default statutory maximum, the rule of Apprendi v. New Jersey, 530 U.S. 466 (2000) is not implicated in Suddy's case, see United States v. Robinson, 241 F.3d 115, 120 (1st Cir. 2001), and counsel would have had no basis to raise such a challenge.

134 F.3d 470, 478 (1st Cir. 1998). "Allegations that are so evanescent or bereft of detail that they cannot reasonably be investigated (and, thus, corroborated or disproved) do not warrant an evidentiary hearing." Id. (citing Dalli v. United States, 491 F.2d 758, 761 (2d Cir.1974)). Indeed, in view of the PSR's upper-level (personal use inclusive) amount of 5.36 kilograms, counsel would have risked a Base Level Offense sentencing range of 151 to 188 months if he insisted on an evidentiary hearing on drug amounts. Strickland, 466 U.S. at 689 (observing that a court analyzing counsel's performance must apply "strong presumption" that tactical decisions of counsel fall within a wide range of reasonable professional assistance).[6]

With respect to Suddy's claim that counsel ought to have mounted some sort of challenge on the grounds of insufficient notice to Suddy that he was in 18 U.S.C. § 2 jeopardy, it is evident that ample notice was provided, from the get-go. The indictment as to Count Two charges that Bisco and Suddy "did unlawfully, knowingly and intentionally distribute a substance containing cocaine... and did aid and abet such conduct." (Indictment at 2, Docket No. 1.) It also expressly stated that he was charged with a violation of "Title 18, United States Code, Section 2" at the same time alleging that the 21 U.S.C. § 841(b)(1)(C) penalty provisions applied. As set forth above, Suddy indicated to the Court during the change of plea hearing that he was aware of the aiding and abetting facet of Count Two. He also repeatedly assured the Court that counsel had explained the charges and potential penalties and that Suddy had understood these explanations. Suddy has not alleged any concrete facts that would support a claim that counsel would have been justified in either challenging the aiding/abetting aspect of

[6] Suddy also complains that Bisco and another co-conspirator, Nathan Conley, received lesser sentences. I agree with the United States that there is no leverage for Suddy in this claim to equity with two co-conspirators.

Count II either with respect to the notice to him or with respect to the factual predicate for the charge. "Facially adequate § 2255 claims may be summarily denied when the record conclusively contradicts them." United States v. Butt, 731 F.2d 75, 77 (1st Cir. 1984) (citing Domenica v. United States, 292 F.2d 483, 484 (1st Cir. 1961) and Rule 4(b), Rules Governing § 2255 Proceedings (§ 2255 Rules)). Lastly, I am unable to discern how counsel's tolerance of the dismissal of the Count One conspiracy charge did anything but limit Suddy's exposure, Suddy's conception of the detrimental synergy between the dropping of Count One charges and the sentencing implications for the Count Two aiding and abetting charge notwithstanding. In a similar vein, it is entirely illogical to argue that counsel could have, let alone should have, leveraged a lack of consent to the defense-favorable dismissal of Count One to insist on a plea agreement specifying a lesser drug quantity. See United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993) ("When a petition is brought under section 2255, the petitioner bears the burden of establishing the need for an evidentiary hearing. In determining whether the petitioner has carried the devoir of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets," citations omitted).

Conclusion

For these reasons I recommend that the Court **DENY** Suddy 28 U.S.C. § 2255 relief.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

August 14, 2003.

_____
Margaret J. Kravchuk

CJACOUNSEL, CLOSED, BANGOR, 2255
U.S. Magistrate Judge

U.S. District Court
District of Maine (Portland)
CRIMINAL DOCKET FOR CASE #: 2:00-cr-00051-GC-2
Internal Use Only

Case title: USA v. BISCO, et al
Other court case number(s): None **Date Filed:** 05/30/00
Magistrate judge case number(s): None

Assigned to: JUDGE GENE CARTER
Referred to:

Defendant(s)

SCOTT A SUDDY (2) represented by **SCOTT A SUDDY**
TERMINATED: 01/02/2001 Reg. No. 03954-036
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TERMINATED: 01/02/2001
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ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Pending Counts	**Disposition**
21:841A=ND.F NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE: 21841(a)(1) and 18U.S.C.2 distribution of cocaine and aiding and abetting (2)	To be imprisoned for a term of 96 months; Four years supervised release w/special conditions; Special Assessment of $100; and Fine waived.

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
21:841A=ND.F NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE:21:846,841(a)(1) Conspiracy to distribute and possess with the intent to distribute cocaine (1)	At the time of sentencing; Government orally moves to dismiss count one of the indictment

Highest Offense Level (Terminated)

Felony

Complaints	**Disposition**
None	

Plaintiff

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